82 - 1446

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Petitioner,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

THEODORE L. FREEDMAN
LEVY AND ERENS

RANDOLPH W. THROWER
FRANCIS M. GREGORY, JR.
SUTHERLAND, ASBILL
& BRENNAN
1666 K Street, N.W.
Suite 800
Washington, D.C. 20006

PETER L. ZIMROTH
KOSTELANETZ AND RITHOLZ
80 Pine Street
New York, New York 10005

KENNETH H. SINGER
Vice President-General Counsel
Lifetime Communities, Inc.
3740 Beach Boulevard, Suite 202
Jacksonville, Florida 32207

RICHARD F. LEVY
Counsel of Record
LEVY AND ERENS
208 South LaSalle Street
Suite 1100
Chicago, Illinois 60604
(312) 368-9500
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Where, during the pendency of a petition for rehearing before the Court of Appeals, Petitioner filed a motion in that Court asserting that a bill passed by the United States Congress limiting fees in bankruptcy cases, which was undisputedly dispositive of this case, had become law subsequent to the District Court order appealed from (because a purported "pocket veto" of the bill by the President was not effective), did the Court of Appeals err when it failed either (i) to determine whether the veto of the bill was effective, or (ii) to remand the case to the District Court with instructions to make such a determination?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Petitioner,
v.
THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The following reported opinions have been issued by courts below in connection with the payment of fees in this bankruptcy proceeding: (1) *In re Fidelity Mortgage Investors*, 16 B.R. 477 (S.D.N.Y. 1981); (2) *In re Fidelity Mortgage Investors*, 690 F.2d 35 (2d Cir. 1982).[1]

---

[1] The opinion by Bankruptcy Judge Roy Babitt denying Lifetime's application for a reduction in fees was delivered orally. *In re Fidelity Mortgage Investors*, Arrangement No. 75 B 154 (unreported oral opinion, November 25, 1980).

JURISDICTION

The Judgment below was entered on August 23, 1982. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was denied on December 1, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1976).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Article I, Section 7, Clause 2

The text of this provision is set forth at A-28.

Original Savings Provision of the Bankruptcy Reform Act of 1978

> Sec. 403 (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.
>
> * * * *
>
> (e) Notwithstanding subsection (a) of this section, a fee may not be charged under Section 40c (2) (b) of the Bankruptcy Act in a case in which the plan is confirmed after September 30, 1978, to the extent that such fee exceeds $100,000.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(a), (e), 92 Stat. 2549, 2683.

---

[2] Pursuant to Supreme Court Rule 28.1, Petitioner Lifetime Communities, Inc. states that there are no parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates within the meaning of the Rule.

H.R. 4353 Amendment to Section 403

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 403(e) of the Act of November 6, 1978 (92 Stat. 2549; Public Law 95-598), is amended by inserting "or in which the final determination as to the amount of such fee is made after September 30, 1979, notwithstanding an earlier confirmation date," immediately after "September 30, 1978,".

H.R. 4353, 97th Cong., 1st Sess. (1981).

STATEMENT OF THE CASE

This case was commenced on January 30, 1975, when Fidelity Mortgage Investors ("FMI") filed a petition for an arrangement under Chapter XI of the now superseded Bankruptcy Act.[3] On January 4, 1978, Bankruptcy Judge Lesser entered an order (the "Confirmation Order") under Section 366 of the Bankruptcy Act, 11 U.S.C. § 766 (1976), confirming an Amended Chapter XI Plan (the "Plan"). (A-17) On February 28, 1978, as allowed by the Plan, FMI merged into Lifetime Communities, Inc. ("Lifetime" or "Petitioner"), with Lifetime acquiring all assets and liabilities of FMI including all debts, liabilities, obligations, and duties created by the Plan.

As a consequence of confirmation of the Plan, a schedule of additional fees adopted by the Judicial Conference of the United States at its March 16-17, 1970 meeting (the "1970 Schedule"), if applicable, would require Lifetime to make a payment, which was estimated at the time of confirmation to be approximately $1.7 million, to the Referees' Salary and Expense Fund (the "Fund").[4]

---

[3] The basis for federal jurisdiction over this proceeding in the first instance was 11 U.S.C. §§ 701-799 (1970).

[4] *See* Bankruptcy Act, §§ 37b, 40c(2)(b), 11 U.S.C. §§ 65(b), 68(c)(2)(b) (1976). *See also* 1 *Collier Pamphlet Edition on the Bankruptcy Act and Rules* § 40, at 106 (1976).

In the Confirmation Order the Bankruptcy Judge noted that, while Lifetime had deposited with the Disbursing Agent appointed under the Plan an estimated amount to be paid to the Fund, that deposit was

> provisional only and the Disbursing Agent be, and he hereby is, directed to withhold any payment to the Fund pending further order or orders of the court fixing the precise amount payable to the Fund.

(A-19) No order fixing the precise amount payable to the Fund has yet been entered.

The Bankruptcy Act, under which this proceeding was instituted, was superseded by the enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (the "Bankruptcy Reform Act") on November 6, 1978. One of the changes implemented by the Bankruptcy Reform Act was the elimination of the Fund with respect to bankruptcy cases commenced subsequent to October 1, 1979. Congress determined that the mechanism for financing the bankruptcy system effected by the Fund was burdensome and inequitable, and no longer appropriate.[5]

In addition, Congress provided in the Bankruptcy Reform Act that payments to the Fund should be limited in cases pending under the Bankruptcy Act on November 6, 1978. Specifically, Congress limited such payments to $100,000 where the plan in such a pending case was confirmed after September 30, 1978. Bankruptcy Reform Act, Pub. L. No. 95-598, § 403(e), 92 Stat. 2549, 2683 (quoted *supra* at 2). These provisions of the Bankruptcy Reform Act placed the FMI Chapter XI proceeding in an unusual posture. While debtors in new cases

---

[5] *See In re Gulf Overseas Service Corp.*, 20 C.B.C. 1019, 1021 (W.D. La. 1979); Magistrates: Hearings on S. 2266, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess., Part II, 876 (1977); Report of the Judicial Conference Meeting of March, 1969, cited in S. Rep. No. 93-612 to accompany S. 1394, 92d Cong., 2d Sess. 2 (1972).

under the Bankruptcy Reform Act are not required to make any payment to the Fund, and while debtors in Chapter XI proceedings under the Bankruptcy Act whose plans were confirmed after September 30, 1978, do not have to pay more than $100,000 to the Fund, Petitioner would be required to pay approximately $1.7 million solely because its Plan was confirmed on January 4, 1978, despite the fact that no determination has yet been made of the payment due to the Fund.

To remedy this inadvertent gap in the legislation,[6] H.R. 4353, 97th Cong., 1st Sess. (1981) (quoted *supra* at 3) was introduced on July 31, 1981. 127 Cong. Rec. H5860 (daily ed. Aug. 1, 1981). H.R. 4353, discussed further below, limits the payment to the Fund to $100,000 in a case such as the instant proceeding where no determination of the amount of the payment was made as of September 30, 1978, notwithstanding earlier confirmation of the Plan.

Subsequent to the entry of the Confirmation Order (but prior to the introduction of H.R. 4353), Lifetime moved the Bankruptcy Court for an order reducing the amount of the payment to the Fund (then estimated to be approximately $1.7 million) which would be required of it by the 1970 Schedule. That motion, which was based upon considerations not relevant to this proceeding, was denied by order of Bankruptcy Judge Babitt on November 25, 1980, and the District Court, applying pre-H.R. 4353 law, affirmed Judge Babitt's order in an opinion filed on December 21, 1981. (A-12)

H.R. 4353 was approved by Congress on December 16, 1981, 127 Cong. Rec. H9809, S15645 (daily ed. Dec. 16, 1981), and both Houses adjourned for the inter-sessional recess of the 97th Congress later that day. 127 Cong. Rec. H9927, S15550 (daily ed. Dec. 16, 1981). On December 18, 1981, H.R. 4353 was signed by the Speaker

---

[6] 127 Cong. Rec. H9808 (daily ed. Dec. 16, 1981).

pro tempore and presented to the President. 127 Cong. Rec. H9933-34 (daily ed. Dec. 18, 1981). *It is undisputed that H.R. 4353, unless effectively vetoed, limits the payment obligation of Lifetime to the Fund to $100,000.*[7]

On December 29, 1981, the President purported to veto H.R. 4353. 127 Cong. Rec. H9935 (daily ed. Jan. 6, 1982). Thereafter, on January 20, 1982, Lifetime filed a timely notice of appeal from the December 21 Judgment. At that time, the issue of whether H.R. 4353 became law was not raised before the Second Circuit.

The Second Circuit affirmed the Judgment on August 23, 1982 (A-1) and Lifetime promptly filed a Petition for Rehearing with Suggestion for Rehearing In Banc. On September 10, 1982, during the pendency of Lifetime's petition, attorneys for Lifetime became aware of information suggesting that the President had not accomplished an effective veto of H.R. 4353, but instead had attempted a constitutionally ineffective "pocket veto" of that bill. Upon confirmation of this information, Lifetime filed on September 20, 1982, a Motion for Leave to File Memorandum Supplementing Petition for Rehearing, and Motion for Stay of Decision and Mandate, for Reversal or for Remand (the "H.R. 4353 Motion"). This motion requested that the Court of Appeals, prior to issuing any decision or mandate, either (i) determine whether, as Lifetime contends, H.R. 4353 became law on December 30, 1981 because the President's attempted "pocket veto" was ineffective, or (ii) remand the case to the District Court for such a determination.

The Administrative Office of the United States Courts ("Respondent"), in replying to Lifetime's motion, agreed with Petitioner that the interests of justice required that

---

[7] Appellee's Response to Appellant's Motion for Leave to File Memorandum Supplementing Petition for Rehearing (quoted *infra* at 7). *See also* Brief for Appellee on the merits in the Court of Appeals, at 30.

a determination should be made as to the effectiveness of the President's purported veto of H.R. 4353. The full text of their response is set forth below:

> Appellee, the Administrative Office of the United States Courts, does not oppose Appellant's motion to the extent to which it seeks leave to file a memorandum supplementing its petition for rehearing, and Appellee agrees that the case should be reheard by the panel on the issue of the validity of the President's veto of H.R. 4353.
>
> 1. Appellee's memorandum raises the issue of the validity of the President's "pocket veto" of H.R. 4353, *a bill which, had it been enacted, would have altered the law applicable to this case.* The government is confident that the President's veto of H.R. 4353 was well within his constitutional powers. However, this issue was not addressed by the panel. *In the interests of justice, the government believes that this case should be reheard by the panel on this issue alone,* and accordingly a briefing schedule should be established so that Appellant's claim may be fully aired.
>
> 2. In all other respects, the government opposes Appellant's motion.

(Emphasis added).[8]

The Court of Appeals, however, declined either to consider the effect of H.R. 4353 or to direct the District Court to do so. Instead, the Court of Appeals on October 21, 1982, denied Lifetime's motion, stating only that its mandate would issue promptly following determination of Lifetime's petition for rehearing "in order that appellant may make a timely application in the district court for Rule 60(b) relief, if appropriate." (A-10) *As demonstrated below, this ruling was erroneous.*

---

[8] A footnote in the response setting out a suggested briefing schedule is omitted.

On December 1, 1982, the Court of Appeals denied the Petition for Rehearing with Suggestion for Rehearing In Banc (A-26), and its mandate issued on December 8, 1982. On December 17, 1982, Lifetime, pursuant to the only avenue left open by the Court of Appeals, filed with the District Court a Motion for Relief under Rule 60(b) of the Federal Rules of Civil Procedure. Lifetime intends to ask the District Court to hold its motion under Rule 60(b) in abeyance pending this Court's review of this Petition.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Unless H.R. 4353 was effectively vetoed, it is unquestionably dispositive of the matter which was before the Court of Appeals. While Lifetime's Petition for Rehearing was pending, Lifetime filed a motion requesting the Court of Appeals to determine the effectiveness of H.R. 4353 and apply it in the instant case, or in the alternative, to remand the case to the District Court for such a determination. In addition, Respondent in its response to that motion stated that "in the interests of justice" the Court of Appeals should make such a determination. The denial of that motion by the Court of Appeals, and its subsequent denial of the Petition for Rehearing, conflict with applicable decisions of this Court which have established that an appellate court must determine and apply the law as it exists when it makes its ruling, and not as it existed when the order appealed from was entered. The obligation of the Court of Appeals to apply the statutes of the United States to the case before it was not met by suggesting that Petitioner file a Rule 60(b) motion.

I. Petitioner Does Not Ask This Court To Determine Whether H.R. 4353 Was Effectively Vetoed.

The sole issue raised by this Petition is whether the Court of Appeals erred in failing either (i) to determine

whether H.R. 4353 became law, or (ii) to remand the case to the District Court to make such a determination.[9]

II. It Is Well Established That An Appellate Court Must Apply The Law As It Exists At The Time Of Its Ruling.

Numerous decisions of this Court have established beyond question "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974) (amended statute permitting award of attorney's fees applied to pending case). This principle has been held applicable *whenever* a case is *sub judice*, regardless of the procedural posture of the case. Thus, where a statute has been amended subsequent

---

[9] Petitioner's position that H.R. 4353 became law (which was set forth in its H.R. 4353 Motion filed in the Court of Appeals) may be briefly summarized as follows: If the President desires to disapprove a bill, he is required to return the bill to the originating house within ten days (Sunday excepted) in order that Congress may have the opportunity of overriding the veto. United States Constitution, Article I, Section 7, Clause 2 (full text set forth at A-28). If the bill is not so returned, the bill becomes law at the expiration of the ten-day period, unless Congress by its adjournment has prevented the return of the bill. *Id.* Where the return is prevented, the inaction of the President results in the "pocket veto" of the bill. The President attempted a "pocket veto" of H.R. 4353, apparently because Congress was in an inter-session recess (between the First Session and the Second Session of the 97th Congress) at the time the ten-day period expired. It is Petitioner's position that this recess did not "prevent" the return of the bill, because the Clerk of the House of Representatives was authorized under House rules to receive messages from the President during the recess. *See Wright v. United States*, 302 U.S. 583 (1938); *Kennedy v. Sampson*, 364 F. Supp. 1075 (D.D.C. 19[illegible], *aff'd*, 511 F.2d 430 (D.C. Cir. 1974); *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). *See also* Kennedy, *Congress, The President, and The Pocket Veto*, 63 Va. L. Rev. 355 (1977). Thus, the attempted pocket veto was ineffective. H.R. 4353 became law and, as such, is concededly dispositive of this case.

to the decision of the lower court, and the amended statute clearly applies to pending proceedings, the reviewing court must apply the amended statute. *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940) (bankruptcy amendment enacted after petition for writ of certiorari filed held applicable to pending proceeding).

The rule that changes in the law must be considered and followed by an appellate court has been held applicable even when the change did not take place until *after* a petition for rehearing had been denied. In *Huddleston v. Dwyer*, 322 U.S. 232 (1944), a new state court decision, issued after the Court of Appeals denied rehearing, was brought to the attention of the Court of Appeals in a second petition for rehearing, which was also denied. 322 U.S. at 235. Applying the general rule stated above, this Court vacated the judgment below and remanded to the Court of Appeals to reconsider its decision in light of the recent state court decision. 322 U.S. 237-38.

In view of the decision in *Huddleston v. Dwyer*, and the line of cases represented by that decision, it is clear that where, as in the present case, a potentially dispositive development in the law occurring after the District Court order appealed from is brought to the attention of the Court of Appeals *while a petition for rehearing is still pending*, the Court of Appeals must determine whether the new law controls the case (or remand to the District Court for such a determination).[10]

III. The Ruling Of The Court Of Appeals Below Conflicts With This Well-Established Rule.

It is undisputed that if H.R. 4353 became law, it would be dispositive of the matter before the Court of Appeals by limiting Lifetime's payment to the Fund to

[10] Indeed, this Court has held that the effect of a new statute must be considered even where counsel *failed* to bring the new law to the Court's attention. *Fusari v. Steinberg*, 419 U.S. 379, 387 & n.12 (1975).

$100,000.[11] Under the decisions of this Court, discussed above, when the Court of Appeals was presented, while a petition for rehearing was pending, with Lifetime's motion asserting that H.R. 4353 was in fact law, it should have either determined whether the President's veto of H.R. 4353 was effective, or remanded the case to the District Court to make such a determination.

Respondent has conceded that such a determination should have been made. In response to Petitioner's H.R. 4353 Motion, which raised the issue whether H.R. 4353 became law, Respondent stated to the Court of Appeals that the "interests of justice" required considering the merits of the issue raised as to the effectiveness of the President's purported veto of H.R. 4353.

Instead of considering whether H.R. 4353 had become law, however, the Court of Appeals denied Petitioner's motion in a two-paragraph order and suggested that Petitioner seek relief in the District Court under Rule 60(b) of the Federal Rules of Civil Procedure, citing *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).[12] (A-10) The Court of Appeals subsequently denied the Petition for Rehearing with Suggestion for Rehearing In Banc. (A-26)

As suggested by the Second Circuit, Petitioner has filed a motion seeking relief under Rule 60(b) in the District Court. However, Petitioner should not be required to seek relief under Rule 60(b). Consideration of Peti-

---

[11] Appellee's Response to Appellant's Motion for Leave to File Memorandum Supplementing Petition for Rehearing (quoted *supra* at 7). *See also* Brief for Appellee on the merits in the Court of Appeals, at 30.

[12] *Standard Oil Co. v. United States* merely held that a party need not file a motion for an appellate court to recall its mandate prior to seeking relief under Rule 60(b) in the District Court. 429 U.S. at 19. This opinion does *not* support the Court of Appeals' decision requiring that consideration of a potentially dispositive statute of the United States may occur only pursuant to a Rule 60(b) motion.

tioner's Rule 60(b) motion may involve a measure of uncertainty and extraneous factors having nothing to do with the question of whether H.R. 4353 controls this case. Rather, the decisions of this Court discussed above establish that a reviewing court *must* apply a recently enacted statute such as H.R. 4353 which is by its terms applicable to the pending proceeding.

Indeed, the Court of Appeals' limiting of the consideration of H.R. 4353 to a proceeding under Rule 60(b) conflicts with the Second Circuit's own prior decisions. In *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied sub nom. Addabbo v. Curtiss-Wright Corp.*, 400 U.S. 829 (1970), the Second Circuit revised its original opinion when a new state court decision was brought to its attention in an out-of-time motion not filed until after a petition for certiorari had been filed in this Court. In determining that the new state court opinion should be considered, the Second Circuit stated:

> For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion.

424 F.2d at 430.

It is easy to understand why in response to the H.R. 4353 Motion, Respondent represented to the Court that the "interests of justice" required the Court of Appeals to determine whether H.R. 4353 became law. If final judgment were to be entered in this case without considering the question of whether H.R. 4353 is law, the judgment would be in direct conflict with the applicable decisions of this Court as well as the applicable decisions of the Second Circuit.

CONCLUSION

The petition for writ of certiorari should be granted. Petitioner respectfully suggests further that the Judgment below be summarily vacated with instructions to the Court of Appeals either (i) to determine whether the veto of H.R. 4353 was effective, or (ii) to remand the case to the District Court to make such a determination.

Respectfully submitted,

/s/ Richard F. Levy

RICHARD F. LEVY
LEVY AND ERENS
208 South LaSalle Street
Suite 1100
Chicago, Illinois 60604
(312) 368-9500
Attorney for Petitioner

Of Counsel:

THEODORE L. FREEDMAN
LEVY AND ERENS

RANDOLPH W. THROWER
FRANCIS M. GREGORY, JR.
SUTHERLAND, ASBILL
& BRENNAN
1666 K Street, N.W.
Suite 800
Washington, D.C. 20006

PETER L. ZIMROTH
KOSTELANETZ AND RITHOLZ
80 Pine Street
New York, New York 10005

KENNETH H. SINGER
Vice President-General Counsel
Lifetime Communities, Inc.
3740 Beach Boulevard, Suite 202
Jacksonville, Florida 32207

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of February, 1983, served three copies of the foregoing Petition on counsel for Respondent by causing such copies to be sent by first class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ Richard F. Levy

RICHARD F. LEVY

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No. 1230 August Term, 1981
(Argued May 21, 1982 Decided 8/23/82)

Docket No. 82-5005

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor,

LIFETIME COMMUNITIES, INC.,
v. *Appellant,*

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Aug. 23, 1982]

Before: TIMBERS, VAN GRAAFEILAND and KEARSE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Duffy, J., which affirmed an order of the bankruptcy court, Babitt, J., denying appellant's application for a reduction in the amount of fees payable to the Referees' Salary and Expense Fund. Affirmed.

THEODORE L. FREEDMAN, Chicago, Ill. (James M. Lawniczak, Levy and Erens, Chicago, Ill.; Kenneth Singer, General Counsel, Lifetime Communities, Inc.; Eliot Lumbard, Lumbard and Phelan on the brief), *for Appellant.*

STUART M. BERNSTEIN, Assistant United States Attorney, New York, N.Y. (John S. Martin, Jr., U.S. Atty., S.D.N.Y., Richard N. Papper, Asst. U.S. Atty., New York City, on the brief), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

Lifetime Communities, Inc., the successor by merger to the rights and obligations of Fidelity Mortgage Investors, a rehabilitated Chapter XI debtor, appeals from an order of the United States District Court for the Southern District of New York, Duffy, J., which affirmed an order of the bankruptcy court, Babitt, J. Judge Babitt's order had denied Lifetime's application for a reduction in fees totaling $1.65 million, which Lifetime is required to pay to the Referees' Salary and Expense Fund pursuant to section 40c(2)(b) of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *as amended by* Referees' Salary Act of 1946, ch. 512, 60 Stat. 323, 327 (repealed 1978). In seeking to avoid payment of this substantial amount, appellant argues that the promulgation of the fee schedule did not comply with the rulemaking provisions of the Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), *recodified by* Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 381-88, 5 U.S.C. §§ 551-59, and that the fee was so unexpectedly large as to be inequitable. For the reasons hereafter discussed, we affirm.

Beginning with the short-lived Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803), and up to the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330) district judges were assigned the task of appointing bankruptcy referees or their counterparts. The 1898 Bankruptcy Act as originally enacted provided that "[s]uch number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy." § 37, 30 Stat. at 555. However, nothing in the 1898 Act prescribed how the determination of necessity was to be made. This lack was remedied with the enactment of the Referees' Salary Act of 1946, ch. 512, 60 Stat. 323 (repealed 1978). That Act provided that the Director of the Administrative

Office of the United States Courts, after making appropriate local and national surveys of pertinent conditions, should recommend to the district judges, the various circuit councils and the Judicial Conference the number of referees to be approved and the territory which each should serve. *Id.* § 37b(1), 60 Stat. at 325. The district judges were directed to make recommendations thereafter to their respective circuit councils, which in turn would make recommendations to the Judicial Conference. *Id.* "[I]n the light of the recommendations of the Director and of the councils", the Conference was to determine the number of referees to be appointed and the territories they were to serve. *Id.*

The primary aim of the Referees' Salary Act, was the replacement of the then-existing fee system for compensating referees with a salary system. S. Rep. No. 959, 79th Cong., 2d Sess. 2, *reprinted in* 1946 U.S. Code Cong. Service 1231, 1232. The method prescribed for fixing referees' salaries was the same as that used in determining the need for referees. The Administrator reported to the district judges, the circuit councils, and the Judicial Conference. The district judges advised the councils, the councils made recommendations to the Judicial Conference and "in the light of the recommendations of the councils", the Conference determined the salaries. Referees' Salary Act § 37b(1), 60 Stat. at 325 & § 40c (2), 60 Stat. at 327.

In relieving referees of the responsibility of financing their individual offices, Congress did not abandon the concept of a self-supporting bankruptcy system. S. Rep. No. 959, *supra*, at 5-6, *reprinted in* 1946 U.S. Code Cong. Service at 1235-36; *United States v. Kras*, 409 U.S. 434, 448 (1973). Instead, Congress provided that there should be a filing fee, plus additional fees based in substance upon the size of the estate, *Mesa Farm Co. v. United States*, 475 F.2d 1004, 1007-08 (9th Cir. 1973). The additional fees were to be fixed in such a manner that the

total annual fees collected would approximate the total amount of the referees' annual salaries and expenditures. Referees' Salary Act § 40c(2), 60 Stat. at 327; *United States v. Nickerson & Nickerson, Inc.*, 530 F.2d 811, 814 n.5 (8th Cir. 1976). Congress provided that the same procedure should be followed in determining the schedule of additional fees as was followed in fixing referees' salaries. Referees' Salary Act § 376(1), 60 Stat. at 325. In order, however, that the total of salaries and fees would be kept in approximate balance, the Administrator was authorized to make limited revisions in the fee schedule once a year with the approval of the Conference. *Id.* § 40c(2), 60 Stat. at 327.

In thus empowering the Judicial Conference to set bankruptcy fees, Congress was following the precedent it had set with regard to Court of Appeals fees, Act of September 27, 1944, ch. 413, 58 Stat. 743 (codified as amended at 28 U.S.C. § 1913) and district court fees, Act of September 27, 1944, ch. 414, § 8, 53 Stat. 743, 744 (codified as amended at 28 U.S.C. § 1914(b)). Moreover, enactment of the Referees' Salary Act on June 27, 1946 followed by only sixteen days the enactment of the original Administrative Procedure Act, which took place on June 11, 1946. In view of the lockstep manner in which these two statutes came into being, Congress must have been acutely aware of the rulemaking provisions of the Administrative Procedure Act when it passed the Referees' Salary Act. By providing in the latter Act that the Judicial Conference should determine the schedules of graduated additional fees in asset, management and wage-earning cases "in the light of the recommendations of the Director and of the councils," Congress made clear its intent that the rulemaking provisions of the Administrative Procedure Act were not applicable to the Judicial Conference. *See Gullung v. Humble Oil & Refining Co.*, 210 F. Supp. 292, 293 (E.D. La. 1962).

A ready explanation for this may be found in the legislative history of the Administrative Procedure Act. *See Administrative Procedure Act, Legislative History 79th Cong., 1944-46*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) [hereinafter cited as *Legislative History*]. The Senate Judiciary Committee Print of June 1945, *reprinted in Legislative History, supra*, at 11-44, contains explanations of various provisions in the Act, including section 2(a) which defines "agency". The Committee stated that the term "agency" is defined substantially as in the Federal Reports Act of 1942, ch. 811, 56 Stat. 1079, and the Federal Register Act, ch. 417, 49 Stat. 500 (1935). *Legislative History, supra*, at 12.

Section 7(a) of the Federal Reports Act, 56 Stat. at 1079-80 (current version at 44 U.S.C. § 3502), defines "Federal agency" as "any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government . . . ."

Section 4 of the Federal Register Act, 49 Stat. at 501 (current version at 44 U.S.C. § 1501), defines "agency" as "any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government . . . ."

The Senate Judiciary Committee's Report on the Administrative Procedure Act, S. Rep. No. 752, 79th Cong., 1st Sess. 10 (1945), *reprinted in Legislative History, supra*, at 185, 196, states that the word "agency" is defined in the Act "by excluding legislative, judicial, and territorial authorities." *Id.* at 196.

If legislative history has any significance at all, it is clear that Congress intended the entire judicial branch of the Government to be excluded from the provisions of

the Administrative Procedure Act. *Wacker v. Bisson*, 348 F.2d 602, 608 n.18 (5th Cir. 1965).

It is little wonder, then, that the Judicial Conference, with its membership of judges only, has never followed the rulemaking provisions of the Administrative Procedure Act in determining fees. Neither is it surprising that nobody heretofore has challenged the Conference's well-established and well-known practice. Disgruntled debtors and creditors have not been reluctant to attack fee schedules on other grounds. *See, e.g., United States v. Kras, supra*, 409 U.S. 434; *Mesa Farm Co. v. United States, supra*, 475 F.2d 1004; *American Guaranty Corp. v. Burton*, 380 F.2d 789 (1st Cir. 1967); *American Guaranty Corp. v. United States*, 401 F.2d 1004 (Ct. Cl. 1968). In view of the Conference's long-established practice, we deem it significant that, in section 1930 of the 1978 Bankruptcy Act, 28 U.S.C. § 1930, Congress reinvested the Conference with the power to set fees in Chapter XI cases without mandating any changes in the Conference's method of procedure.

The word "court" like any other word, "may vary greatly in color and content according to the circumstances and the time in which it is used." *See Towne v. Eisner*, 245 U.S. 418, 425 (1918). The term is often employed in statutes otherwise than in its strict technical sense. *Black's Law Dictionary* 425 (rev. 4th ed. 1968). We believe that when, as here, the Judicial Conference is acting in effect as an auxiliary of the courts, it falls within the definition of "court" as that term is used in the Administrative Procedure Act. *See Warth v. Department of Justice*, 595 F.2d 521, 523 (9th Cir. 1979); *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974); *Cook v. Willingham*, 400 F.2d 885, 885-86 (10th Cir. 1968) (per curiam).

One need only examine the annual reports of the Conference to appreciate how integrated its functions are with those of the courts. According to the *1981 Reports*

of the Proceedings of the Judicial Conference of the United States, the Conference during that year considered, among other things, the transcript rates of court reporters, the closing of court facilities, the places for holding court, the allotment of court space, the disposition of court records, the assignment of court reporters, the assignment and salaries of magistrates, miscellaneous fee schedules, and judicial ethics.

Although the Conference was performing an administrative function when it set the bankruptcy fees now being challenged, this is not dispositive of the issue before us. When a judge sets fees, he, too, is performing an administrative function. *In re India Wharf Brewery, Inc.*, 96 F.2d 710, 712 (2d Cir. 1938); *2A Collier on Bankruptcy*, ¶ 39.18, at 1491 (14th ed. 1980). The Conference is performing a task which otherwise might be left to the courts. *Ex parte Peterson*, 253 U.S. 300, 315 (1920). Dicta in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 n.6, 86 n.7, 88 n.10 (1970), do not compel a contrary holding. In that case, the Court was considering whether it had original jurisdiction to issue a writ of mandamus or prohibition against an administrative order of the Judicial Council. It denied the petition on other grounds without deciding the jurisdictional issue. We have no problem with jurisdiction in the instant case. *See American Guaranty Corp. v. United States*, *supra*, 401 F.2d at 1009-11.

The definition of "agency" in 5 U.S.C. § 551 is identical with that in 5 U.S.C. § 701. The term "agency" also appears in 28 U.S.C. § 1391(e), which enlarges the venue of actions brought against an officer, employee, or agency of the United States. In *Liberation News Service v. Eastland*, 426 F.2d 1379 (2d Cir. 1970), this Court was called upon to consider whether section 1391(e) was applicable to ten members of the Senate Committee on the Judiciary. Judge Friendly, writing for the Court, looked to the definition of "agency" as contained in 5

U.S.C. § 701 and concluded that section 1391(e) applied only to the executive branch of the Government. 426 F.2d at 1384.

The applicability of section 1391(e) to the Judicial Conference was before the Court of Appeals for the Fifth Circuit in *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). Plaintiffs in that action were challenging that portion of the Ethics in Government Act of 1978, 28 U.S.C. app. §§ 301-09 (Supp. 1982), which requires federal judges to file financial statements. Pursuant to the provisions of the Act, 28 U.S.C. app. § 303, the Judicial Conference established a Judicial Ethics Committee, whose duty it was in substance to prepare the necessary forms and to monitor compliance with the Act. The Court, citing *Liberation News Service v. Eastland*, *supra*, 426 F.2d 1379, affirmed the district court's dismissal of the complaint against the Judicial Ethics Committee and its chairman on the ground that the Committee was part of the judicial branch of the Government performing a judicial administrative function. 606 F.2d at 663-64. *See also Seltzer v. Foley*, 502 F. Supp. 600, 602 n.2 (S.D.N.Y. 1980).

We are satisfied from the foregoing review that the fees of which appellant complains were fixed lawfully and must be collected. Section 40c(2) of the Referees' Salary Act provides that "[a]dditional fees for the referees' salary and expense fund *shall* be charged in accordance with the schedule fixed by the conference." (emphasis supplied). The plain language of this section permits of no judicially created exception. *See Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, —— U.S. ——, 102 S.Ct. 695, 696-97 (1982). The bankruptcy court's equity jurisdiction did not empower it to go beyond the prescribed limits of the Act. *In re United Merchants and Manufacturers, Inc.*, 597 F.2d 348, 349 (2d Cir. 1979); *Borgenicht v. Credi-*

tors' Committee, 479 F.2d 150, 153 (2d Cir. 1973); *Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304-05 (2d Cir. 1953); *In re FAS International, Inc.*, 382 F. Supp. 77, 79-81 (S.D.N.Y. 1974)), *aff'd. per curiam*, 511 F.2d 1164 (2d Cir.), *cert. denied*, 423 U.S. 839 (1975).

Section 403(e) of the 1978 Act, which limits the amount of fees to $100,000, applies only to those cases in which a plan is confirmed after September 30, 1978. The Act makes no changes in the mandatory contributions that must be made in cases like the instant one where confirmation took place prior to September 30. Bearing in mind that the fees prescribed in the Referees' Salary Act were intended to be applied towards payment of the bankruptcy court's general administration expenses rather than those of the charged estate, *Reconstruction Finance Corp. v. Cohen*, 179 F.2d 773, 776 (10th Cir. 1950), and that the debtor herein was fully aware of the purpose and contents of the fee schedule when it voluntarily sought Chapter XI relief, we conclude that the bankruptcy court did not err in holding the debtor to the precise terms of the schedule.

Finding appellant's remaining arguments to be without merit,[1] we affirm.

---

[1] During 1981, the Judicial Conference denied requests from three debtors, including, we understand, the appellant herein, for reduction or cancellation of fees for the Referees' Salary and Expense Fund. *See Reports of the Proceedings of the Judicial Conference of the United States, supra*, at 35.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of October, One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. WILLIAM H. TIMBERS, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*
HON. AMALYA L. KEARSE, *Circuit Judge*

82-5005

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor,

LIFETIME COMMUNITIES, INC.,
Appellant,

v.

THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Appellee.

[Filed Oct. 21, 1982]

ORDER

Appellant's motion, dated September 20, 1982, for a stay of mandate, reversal or remand of this Court's decisions in this matter is denied.

The mandate of the Court shall issue promptly following the determination of appellant's petition for en banc

consideration in order that appellant may make a timely application in the district court for Rule 60(b) relief, if appropriate. *See Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

/s/ William H. Timbers
HON. WILLIAM H. TIMBERS

/s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

/s/ Amalya L. Kearse
HON AMALYA L. KEARSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

81 Civ. 0544 (KTD)

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Appellant,

—against—

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Dec. 21, 1981]

MEMORANDUM & ORDER

Appearances:

LEVY AND ERENS
Attorneys for Appellant
208 South LaSalle Street
Suite 1100
Chicago, Illinois 60604
Of Counsel: Theodore L. Freedman, Esq.
James M. Lawniczak, Esq.

KENNETH SINGER, ESQ.
Vice President/General Counsel
Lifetime Communities, Inc.
3740 Beach Blvd.
Suite 202
Jacksonville, Florida 32207

LUMBARD AND PHELAN
Attorneys for Appellant
One State Street Plaza
New York, New York 10004
Of Counsel: Eliot Lumbard, Esq.

HON. JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York
Attorney for Appellee
One St. Andrew's Plaza
New York, New York 10007
Of Counsel: Stuart M. Bernstein, Esq.
Assistant U.S. Attorney

KEVIN THOMAS DUFFY, D.J.:

Fidelity Mortgage Investors ["FMI"] filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on January 30, 1975. Pursuant to the Confirmation Order entered on January 4, 1978, FMI was merged into a newly formed corporation called Lifetime Communities, Inc. ["Lifetime"], which assumed all of FMI's assets and liabilities. Under Section 40(c)(2) of the Bankruptcy Act, 11 U.S.C. § 68(c)(2) (1976), FMI was required to remit a fee into the referee's salary and expense fund based upon the amount to be paid to unsecured creditors under the plan of arrangement. In 1970, the United States Judicial Conference set the rate for such fees at 3 percent for the first $100,000 distributed and 1.5 percent of the balance, for all cases filed on and after July 1, 1970. The parties are in accord that under this schedule Lifetime's obligation to the fund is approximately $1.69 million.

Lifetime appeals from the Memorandum Endorsement and Order of Bankruptcy Judge Babitt, dated November 25, 1980, denying its application for a reduction or elimination of this fee. Essentially, Lifetime argues that the fee should be eliminated because the 1970 schedule was not promulgated by the Judicial Conference pursuant to the Administrative Procedures Act ["APA"], and because the levying of such a large fee is simply inequitable, especially in light of the subsequent change in the rule by Congress which limits such contributions to $100,000.

I.

The appellant's first argument is that the 1970 Schedule promulgated by the Judicial Conference is void and unenforceable because the Conference failed to comply with the notice and hearing requirements of the APA. Although the definition of an "agency" for the purposes of the APA expressly precludes the courts, 5 U.S.C. § 551, the appellant argues that the fee setting function of the

Judicial Conference is an administrative act and therefore subject to the APA.

This argument is not persuasive. While the cases cited by Lifetime liken the Judicial Conference to an administrative agency and characterize its functions as administrative, *e.g.*, *Chandler v. Judicial Council*, 398 U.S. 74 (1970), *Nolan v. Judicial Council of the Third Circuit*, 481 F.2d 41 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973); *In re Mesa Farm Co.*, 475 F.2d 1004 (9th Cir. 1973), none of them hold that this arm of the courts is an agency subject to the APA. In *Warth v. Department of Justice*, 595 F.2d 521, 523 (9th Cir. 1979), the court held that, because the courts are not agencies under the APA, and the Freedom of Information Act incorporated therein, court records were not agency documents. Just as quasi-judicial proceedings by administrative agencies are not court proceedings and hence are subject to the APA, *see Wacker v. Bisson*, 348 F.2d 602, 608 (5th Cir. 1965), it follows that the quasi-administrative function of the courts are not necessarily agency functions subject to the APA. Furthermore, the Judicial Conference is made up exclusively of members of the judiciary. The APA excludes the entire judicial branch of the federal government. *Seltzer v. Foley*, 502 F. Supp. 600 (S.D. N.Y. 1980).

II.

The balance of the appellant's argument is premised on the assumption that a fee of $1.69 million pursuant to the dictates of fee schedule is *per se* inequitable. The fee structure was instituted pursuant to the expressed intent of Congress that the bankruptcy system under the old code be self-supporting and paid for by those who used it rather than by tax revenues from the public at large. *United States v. Kras*, 409 U.S. 434, 448 (1978). Consequently, the fee can be more rightly viewed as a user tax rather than a fee for services as argued by the appellant. In this light, an assessment of 1.5 percent of the assets

distributed to unsecured creditors is not *per se* inequitable.

Nor can it be said that the fee is inequitable as applied in this case. The fee schedule was known at the time the debtor sought the protection of the bankruptcy court. The fee itself had to be figured into the successful arrangement under which the debtor now operates. What the appellant really seeks is a windfall to those who have accepted its newly issued stock.

The order appealed from is in all respects affirmed.

SO ORDERED.

DATED: New York, New York
December 17, 1981

/s/ Kevin Thomas Duffy
KEVIN THOMAS DUFFY
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Arrangement No. 75 B 154

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

[Dated January 4, 1978]

ORDER CONFIRMING DEBTOR'S PLAN

The Amended Chapter XI Plan (the "Plan") of Fidelity Mortgage Investors ("FMI"), the above-named debtor, dated November 8, 1977, having been transmitted to creditors; and

The deposit required by Chapter XI of the Bankruptcy Act and by the Plan, in the sum of $13,750,000, having been made to the order of William Helfer, as disbursing agent for FMI (the "Disbursing Agent"), in Citibank, N.A., 1 Citicorp Center, N.Y., N.Y., a designated depository; and

It having been determined after hearing on notice that:

A. The Plan has been duly accepted in writing by creditors whose acceptance is required by law; and

B. The Plan has been proposed and its acceptance procured in good faith, and not by any means, promises or acts forbidden by law, and the provisions of Chapter XI of the Bankruptcy Act have been complied with, and the Plan is for the best interests of creditors and is feasible; and

C. The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; it is

ORDERED, ADJUDGED, DETERMINED AND DECREED that:

1. The Plan, a copy of which is annexed hereto as Exhibit "1", be, and the same hereby is, confirmed.

2. The monies deposited, as aforesaid, be disbursed in accordance with this order and the schedules of distribution filed with the court and incorporated herein by reference (the "Distribution Schedules") and pursuant to such further orders as the court may make, by check to be drawn and signed by the Disbursing Agent and countersigned by the undersigned Bankruptcy Judge, provided, however, that with respect to any creditor named in the Distribution Schedules and as to whose claim objections have been or will be made, as set forth in the Distribution Schedules ("Disputed Claims"), the Disbursing Agent shall hold the monies deposited for the payment of any such Disputed Claims, pending the entry of an order or orders disposing of the objection, and as to any Disputed Claim which has been proved and filed but neither allowed nor disallowed, but as to which no formal objection has yet been filed, FMI may, within one hundred fifty days (150) from the date hereof file with the court an objection to the allowance of such Disputed Claim, and shall bring the objection on for hearing on a date to be fixed by the court and shall serve a copy of the objection and notice of hearing upon the claimant not less than five (5) days prior to the date fixed for the hearing, and in the event of the failure of FMI to file the requisite objections within the period fixed herein, any objection to the allowance of the claims affected thereby shall be deemed waived and said claims shall be deemed allowed as if the same had not been listed as Disputed Claims.

3. The Disbursing Agent shall make the distribution by mailing the monies to the persons entitled thereto by first-class mail, or if represented by duly authorized attorneys at law, then to such attorneys, at their respective addresses as set forth in the Distribution Schedules.

4. The amount appearing as payable to the Referees' Salary and Expense Fund (the "Fund") in the Distribution Schedules is estimated and provisional only and the Disbursing Agent be, and he hereby is, directed to withhold any payment to the Fund pending further order or orders of the court fixing the precise amount payable to the Fund.

5. The Disbursing Agent be, and he hereby is, directed to withhold distribution of any monies to the persons whose claims are set forth in the Distribution Schedules as costs and expenses of administration, pending further orders of the court fixing the precise amount payable to each such person.

6. Concurrently herewith, the debtor has filed with the court a schedule of all creditors who have been listed on its schedules of liabilities, as amended, heretofore filed with the court as having claims which are undisputed, not contingent and liquidated as to amount, but who have not filed claims in this case. Said schedule sets forth the name and address, where known, of such creditors and the scheduled amount of such claims, for the purpose of enabling notice of confirmation to be given to such creditors, which notice shall advise them that (a) they may file a claim within thirty (30) days after the date of mailing of said notice, which claim shall not be allowed in an amount in excess of that set forth in the debtor's schedules as undisputed, not contingent and liquidated as to amount, and (b) the failure to file a claim within said time, shall be a bar to asserting any such claim against FMI. In the event such claims are filed the debtor may thereafter file and serve objections to the allowance thereof within one hundred fifty (150) days after the last date fixed for the filing of any such claims, and upon failure of the debtor to file objections within the time fixed herein the filed claims shall be allowed and deemed included in the appropriate schedules annexed hereto, and the Disbursing Agent shall make distribution of the monies to

which the claimants may be entitled in accordance with the terms of the Plan.

7. Upon determination that there is on deposit with the Disbursing Agent monies in excess of the amounts required to complete the disbursements pursuant to the Plan, such excess monies shall be paid to FMI by check drawn, signed and countersigned as aforesaid.

8. Notwithstanding anything to the contrary contained in this order or the Plan, the Disbursing Agent shall make no distribution of any monies to any of the persons listed on the schedules annexed hereto until the expiration of thirty (30) days from the date of this order.

9. Except as otherwise provided or permitted by the Plan or this order:

a. FMI is released from all of its dischargeable debts;

b. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of FMI with respect to any of the following:

i. Debts dischargeable under Section 17a and b of the Bankruptcy Act;

ii. Unless heretofore or hereafter determined by order of this court to be non-dischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of Section 17a of the Bankruptcy Act;

iii. Unless heretofore or hereafter determined by order of this court to be non-dischargeable, debts alleged to be excepted from discharge under clause (8) of Section 17a of the Bankruptcy Act except those debts upon which there was an action pending on January 30, 1975, the date

when the petition was filed initiating this Chapter XI case under the Bankruptcy Act, in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such demand;

iv. Debts determined by this court to be discharged under Section 17c(3) of the Bankruptcy Act.

10. All creditors whose debts are discharged by this order and all creditors having claims of a type referred to in paragraph 9(b) above are enjoined, stayed and restrained from instituting or continuing any action or employing any process to collect such debts as liabilities or obligations of FMI.

11. The merger of FMI into Lifetime Communities, Inc. ("Lifetime"), a Delaware corporation, as described in the proxy statement of FMI dated November 15, 1977, a copy of which is annexed hereto as Exhibit "2", be, and it hereby is, authorized and approved.

12. Within ninety (90) days after the completition of all distributions required to be made by the Disbursing Agent pursuant to the Plan and this order, or within such further time as the court may allow, the Disbursing Agent shall stop payment on all checks then unpaid and shall deposit the total amount of the said unpaid checks with the Clerk of the Court by certified check, drawn, signed and countersigned as aforesaid, together with a list of the payees' names and addresses and the respective distributions to which each payee is entitled.

13. Within one hundred and twenty (120) days after the completion of all distributions required to be made by the Disbursing Agent pursuant to the Plan and this

order, or such further time as the court may allow, the Disbursing Agent shall file with the court a verified report showing compliance with this order, together with all cancelled vouchers and a bank statement showing the disbursements of all monies which were deposited as required by the provisions of Chapter XI of the Bankruptcy Act and the Plan in the Disbursing Agent's bank account.

14. The court shall retain jurisdiction of this Chapter XI case as provided in the Plan, and of all pending matters of whatsoever kind or nature, and to effectuate a compromise and settlement of the disputes between FMI and Citibank, N.A., as Indenture Trustee, as described in Article III(f)(4) of the Plan, and to determine all pending applications to reject executory contracts and the final allowance or disallowance of any claim arising therefrom. The court shall also retain jurisdiction to determine all applications for allowances of compensation or reimbursement of expenses as costs and expenses of administration of the Chapter XI case.

15. Any claims for damages arising from the rejection of executory contracts pursuant to applications under Chapter XI Rule 11-53 heretofore served and filed with the court shall be filed with the court no later than thirty (30) days from the entry of an order or orders rejecting such executory contracts. Any claims for damages arising from the rejection of executory contracts pursuant to the provisions of the Plan shall be filed with the court no later than thirty (30) days from the date of the notice of confirmation, which notice shall advise that such claims must be filed within thirty (30) days of the date thereof. Upon the failure of any party affected by the rejection of any executory contract to timely file a claim, he shall be forever barred from asserting any such claim against FMI. In the event such claims are filed, FMI may thereafter serve and file objections to the allowance thereof within one hundred twenty (120) days after the last date for the filing of said claims. Upon the failure of FMI to

file objections within the time fixed herein, the filed claims shall be allowed and deemed included in the Distribution Schedules and the Disbursing Agent shall make distribution of the monies to which the claimant may be entitled in accordance with the terms of the Plan.

Dated: New York, New York
January 4, 1978
at 2:30 o'clock p.m.

/s/ Stanley T. Lesser
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of August one thousand nine hundred and eighty-two.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. AMALYA L. KEARSE
Circuit Judges,

#82-5005

IN RE: FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Appellant,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Aug. 23, 1982]

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of December, one thousand nine hundred and eighty-two.

No. 82-5005

IN RE: FIDELITY MORTGAGE INVESTORS,
Debtor

LIFETIME COMMUNITIES, INC.
(Formerly known as Fidelity Mortgage Investors)
Appellant,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Dec. 1, 1982]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Lifetime Communities, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court

in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk

UNITED STATES CONSTITUTION

* * * *

Article I, Section 7, Clause 2

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

* * * *

No. 82-1446

In the Supreme Court of the United States

OCTOBER TERM, 1982

LIFETIME COMMUNITIES, INC., PETITIONER

v.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT E. KOPP
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion in refusing to consider an argument raised by petitioner for the first time in a "Motion to Supplement" its petition for rehearing, which was submitted four weeks after the court of appeals' decision and two weeks after expiration of the time within which to file a petition for rehearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statutes and rules:

Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1446

LIFETIME COMMUNITIES, INC., PETITIONER

v.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 690 F.2d 35. The opinion of the district court (Pet. App. A-12 to A-16) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1982 (Pet. App. A-24 to A-25). A petition for rehearing was denied on December 1, 1982 (Pet. App. A-26 to A-27). The petition for a writ of certiorari was filed on February 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is the successor by merger to the rights and obligations of Fidelity Mortgage Investors, a rehabilitated debtor under Chapter XI of the now superseded Bankruptcy Act, 11 U.S.C. 701 *et seq.* That Act, as amended by

the Referees' Salary Act of 1946, ch. 512, 60 Stat. 327, 11 U.S.C. 68(c)(2) (repealed 1978), provided that "[a]dditional fees for the referees' salary and expense fund shall be charged, in accordance with the schedule fixed by the [Judicial Conference of the United States] * * *." Under the fee schedule promulgated by the Judicial Conference, the obligation of the debtor (and thus of petitioner) to the referees' fund is approximately $1.7 million (Pet. App. A-14). Petitioner's application to the bankruptcy court for a reduction or elimination of this fee was denied on November 25, 1980 (*ibid.*). Petitioner appealed to the district court, arguing that (1) the fee schedule was invalid because it had not been promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and (2) the size of the fee was "simply inequitable" in light of recent amendments to the bankruptcy law that, although not applicable to petitioner, had capped the referees' salary contribution in other bankruptcy cases for which confirmation had occurred at a later date.[1]

The district court affirmed the order of the bankruptcy court on December 17, 1981 (Pet. App. A-16). The district court observed: "The fee schedule was known at the time the debtor sought the protection of the bankruptcy court. The fee itself had to be figured into the successful arrangement under which the debtor now operates. What the appellant really seeks is a windfall to those who have accepted its

---

[1]Under the 1970 fee schedule promulgated by the Judicial Conference, the referees' salary contribution was set at 3% of the first $100,000 of the assets distributed to unsecured creditors, plus 1.5% of the balance so distributed (Pet. App. A-14). Thereafter, Congress amended the bankruptcy law so as to limit the maximum contribution for the referees' salary to $100,000 for Bankruptcy Act cases "in which the plan is confirmed after September 30, 1978" (Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(e), 92 Stat. 2683). Because its plan was confirmed on January 4, 1978 (Pet. App. A-17), the limitation does not apply to petitioner. The bankruptcy court has not yet entered an order fixing the precise amount that petitioner must pay to the referees' salary fund.

newly issued stock" (*ibid.*). The district court's memorandum and order were filed on December 21, 1981 (*id.* at A-12).

On July 31, 1981, while petitioner's case was pending before the district court, H.R. 4353 was introduced in Congress. H.R. 4353, 97th Cong., 1st Sess.; 127 Cong. Rec. H5860 (daily ed. Aug. 1, 1981). This bill would have extended the cap on contributions to the referees' salary fund to cases "in which the final determination as to the amount of such fee is made after September 30, 1979, notwithstanding an earlier confirmation date" (127 Cong. Rec. H9808 (daily ed. Dec. 16, 1981)). The bill was approved by Congress on December 16, 1981 (*id.* at H9809, S15645); later that day, both Houses completed their work for the first session of the 97th Congress and adjourned sine die (*id.* at H9927, S15550). At the time H.R. 4353 was delivered to the President, the second session of the 97th Congress had not yet begun; that session did not convene until January 25, 1982 (128 Cong. Rec. H1, S1 (daily ed. Jan. 25, 1982)). Under the provisions of Article I, section 7, clause 2 of the United States Constitution, "[i]f any Bill shall not be returned by the President [to the Congress] within ten Days (Sundays excepted) after it shall have been presented to him * * * [and] the Congress by their Adjournment prevent its Return, * * * [the Bill] shall not be a Law." Thus, because the President declined to sign H.R. 4353, and because Congress was not in session from December 17, 1981, through January 24, 1982, H.R. 4353 did not become law.

On December 29, 1981, the President issued a "Memorandum of Disapproval," which set forth his objections to H.R. 4353. See 127 Cong. Rec. H9935 (daily ed. Jan. 6, 1982).[2] The President opposed H.R. 4353 on the ground

---

[2]The Congressional Record of January 6, 1982, was composed primarily of summaries of prior legislative action and off-the-floor statements by Senators.

that it had been enacted "to benefit the creditors of a single large asset bankruptcy" and that he could not "support this effort to confer special relief in the guise of general legislation at a possible loss to the Treasury of $1.6 million" (*ibid.*). The President noted that "nothing except this debtor's dispute of the assessment distinguishes this one case from all others where the plan of arrangement was confirmed prior to September 30, 1978" (*ibid.*).

On January 20, 1982, several weeks after the "pocket veto" of H.R. 4353, petitioner filed a notice of appeal to the United States Court of Appeals for the Second Circuit. In its briefs petitioner urged that the referees' salary fund contribution be reduced on the same grounds it had presented to the district court, *i.e.*, that the fee schedule had not been promulgated in accordance with the Administrative Procedure Act and that its application to petitioner was "inequitable." See Pet. App. A-2. The court of appeals rejected these arguments and on August 23, 1982, affirmed the district court's order. *Id.* at A-1 to A-9. On September 7, 1982, petitioner filed a petition for rehearing. That petition, like petitioner's previous briefs, did not challenge the effectiveness of the President's veto of H.R. 4353.

On September 20, 1982, some two weeks after the expiration of the 14-day period within which to file a petition for rehearing (Fed. R. App. P. 40(a)), petitioner sought for the first time to challenge the effectiveness of the President's pocket veto of H.R. 4353. On that date, petitioner filed a motion with the court of appeals requesting that its petition for rehearing be "supplemented" to include the argument that the President lacks the constitutional authority to "pocket veto" bills during an intersessional recess by Congress. The only excuse offered by petitioner for the untimeliness of its motion was that its counsel had not learned until September 10, 1982, that the President's veto was a pocket veto (Affidavit of Wright H. Andrews, Jr., filed in support

of petitioner's motion for leave to file memorandum supplementing petition for rehearing). The government did not oppose petitioner's motion; although it was "confident that the President's veto of H.R. 4353 was well within his constitutional powers," the government "[i]n the interests of justice" agreed that the case should be reheard on that issue. See Pet. 7.

The court of appeals denied petitioner's motion to supplement, stating (Pet. App. A-10 to A-11):

> Appellant's motion * * * is denied.
>
> The mandate of the Court shall issue promptly following the determination of appellant's petition for en banc consideration in order that appellant may make a timely application in the district court for Rule 60(b) relief, if appropriate. *See Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

The court of appeals subsequently denied the petition for rehearing (Pet. App. A-26).[3]

ARGUMENT

Petitioner's unsuccessful attempt to raise the effectiveness of the President's pocket veto of H.R. 4353 by what amounts to an out-of-time petition for rehearing does not warrant further review. Whether to accept such untimely filings is a matter within the discretion of the court of appeals. Petitioner offers no circumstances suggesting any abuse of discretion here. Moreover, petitioner failed to raise the pocket veto issue in its principal briefs before the court of appeals, although no reason prevented it from doing so.

---

[3]In accordance with the court of appeals' suggestion, petitioner filed in the district court a motion for relief under Fed. R. Civ. P. 60(b). The government opposed that motion on the ground that none of the extraordinary circumstances enumerated under that rule exists in this case. The motion is currently pending.

For that reason, even if petitioner's filing had met the deadline for a petition for rehearing, the court of appeals would not have abused its discretion in declining to rule on the issue.

1. Fed. R. App. P. 40(a) provides in part:

> A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

The petition for rehearing filed by petitioner, like its briefs in the court of appeals and the district court, did not raise the effectiveness of the President's pocket veto of H.R. 4353. Petitioner first raised that issue by means of a "Motion to Supplement," filed September 20, 1982, which was 28 days after entry of the court of appeals' judgment and thus after the time for filing a petition for rehearing had expired. The "Motion to Supplement" was in effect a second petition for rehearing filed 14 days out of time, since the original petition did not "state with particularity" the pocket veto argument.

It is well established that a court may, in the exercise of its discretion, refuse to entertain an out-of-time petition for rehearing. See, *e.g.*, *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137 (1937). The rationale underlying that principle is evident. If a party could continually seek rehearing on different issues, both judicial economy and the public interest in finality would be compromised. As this Court has observed, such principles reflect "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end

after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). Thus, while the court of appeals could have granted the petition in order to consider the pocket veto issue (and we did not oppose the petition), the court acted reasonably and within its discretion in denying the petition.

2. Moreover, petitioner failed to address in its appellate briefs the constitutional issue it sought to raise in the out-of-time petition for rehearing. Petitioner had ample opportunity to learn about the President's pocket veto of H.R. 4353 and to raise its effectiveness in a timely fashion in the court of appeals, and perhaps even in a motion in the district court immediately after the veto.[4] The only reason petitioner offered for seeking to raise the issue so late in the day was, in effect, that it had not previously investigated the circumstances of the veto or thought of this line of argument (Pet. 6). But it is settled that, absent exceptional or jurisdictional circumstances, an issue an appellant does not raise and argue in its briefs to the court of appeals need not be considered by the court. See *Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 552 F.2d 1285, 1295-1296 (8th Cir. 1977) (issue may not be raised for the first time in a petition for rehearing when it had not been raised previously in the trial court or the court of appeals); *Marion Steam Shovel Co.* v. *Bertino*, 82 F.2d 945 (8th Cir.), cert. denied, 299 U.S. 556 (1936) (on rehearing, appellant could not for the first time raise questions that were not urged on

---

[4]Petitioner's counsel represent that they took an active role on behalf of petitioner, "seeking congressional passage of H.R. 4353, 97th Congress, First Session." Affidavit of Wright H. Andrews, Jr., Supporting Motion for Leave to File Memorandum Supplementing Petition for Rehearing at 1-2. However, they apparently did not inform the district court of the fact that Congress had passed the bill on December 16, 1981, or suggest to the court that it withhold filing of its memorandum and order in view of the congressional developments. The district court's memorandum and order were filed on December 21, 1981.

original hearing). See also *Brown* v. *Sielaff*, 474 F.2d 826, 828 (3d Cir. 1973); *United States* v. *Anderson*, 584 F.2d 849, 853 (6th Cir. 1978); *Chicago & Western Indiana R.R.* v. *Motorship Buko Maru*, 505 F.2d 579, 581 (7th Cir. 1974); *Mississippi River Corp.* v. *FTC*, 454 F.2d 1083, 1093 (8th Cir. 1972); *Platis* v. *United States*, 409 F.2d 1009, 1012 (10th Cir. 1969).

The court of appeals had discretion to consider the untimely constitutional issue, notwithstanding petitioner's failure to raise it in its briefs. However, the circumstances under which courts have exercised such discretion have generally been exceptional and have involved public interest considerations. See, *e.g.*, *Consumers Union of United States, Inc.* v. *FPC*, 510 F.2d 656, 662 (D.C. Cir. 1974) (resolution of case had important implications for the price American consumers would pay for natural gas); *Platis* v. *United States, supra*, 409 F.2d at 1012 (new government argument would be considered because public monies were involved). This case does not involve exceptional circumstances. Petitioner did not seek to bring to the court of appeals' attention events that occurred between submission of briefs and a decision by the court; to the contrary, the circumstances on which petitioner now relies arose well before it framed its arguments before the court of appeals. Compare *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944) (court of appeals should consider the effect of a relevant state court decision issued *after* denial of the first petition for rehearing); *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), cert denied, 400 U.S. 829 (1970) (same). Moreover, the issue petitioner sought to raise belatedly is not one that requires simply the mechanical application of a law that had been overlooked; rather, the issue of

the effectiveness of the President's pocket veto of H.R. 4353 presents difficult questions of constitutional law.[5]

Nor would grant of petitioner's motion to supplement have advanced any special public interest. H.R. 4353 was intended to function as a private law, affecting only petitioner. Thus, allowing petitioner an opportunity to litigate further the size of the fee it must pay into the referees' salary fund would not have benefited the public in general. The government was willing to have this case reheard so that the court of appeals could address the effectiveness of the President's pocket veto of H.R. 4353, and stated that such rehearing would be in the interests of justice. However, the government's acquiescence in petitioner's belated motion did not require the court to consider the new issue. Thus, the government's position before the court of appeals is not inconsistent with the conclusion that the court did not

---

[5]In *The Pocket Veto Case*, 279 U.S. 655, 672 (1929), this Court held that a bill does not become law if that bill "is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated." In the course of its opinion, the Court emphasized that the same result would occur, even if Congress should make provision for delivery "to an officer or agent of the House, for subsequent delivery to the House when it resumes its sittings at the next session * * *" (*id.* at 684).

Petitioner, in its memorandum to the court of appeals, relied on *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974), which held that *intrasession* adjournments by Congress do not prevent the President from returning bills to Congress without his signature, at least so long as Congress authorizes officers to accept returns during such adjournments. Petitioner also relied on *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C 1976). In that case, Senator Kennedy sought to challenge, inter alia, the validity of an *intersession* pocket veto, like that upheld by this Court in *The Pocket Veto Case, supra.* However, the district court in *Kennedy* v. *Jones* addressed only issues of justiciability. Since the defendants had consented to entry of judgment on behalf of the plaintiff, the district court did not discuss the merits of the case.

abuse its discretion in declining to rehear the case. This conclusion is reinforced by the availability in appropriate circumstances, noted by the court of appeals (Pet. App. A-11), of a remedy under Fed. R. Civ. P. 60(b), under which a court may relieve a party from a final judgment if that judgment was occasioned by "mistake, inadvertence, surprise, or excusable neglect," or for other specified equitable reasons.

3. Petitioner's contentions that the court of appeals erred in denying its "Motion to Supplement" are without merit. Petitioner relies exclusively on cases such as *Huddleston* v. *Dwyer, supra*, and *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974), which hold that the reviewing court should determine a case on the basis of the "law in effect at the time it renders its decision." *Id.* at 711. In those cases the Court addressed changes in the law that could not have been preserved in the trial court or properly presented to a reviewing court —*e.g.*, because of a change in law *after* the trial court determination, as in *Bradley*, or *after* the filing of a petition for rehearing in the court of appeals, as in *Huddleston*. But such circumstances do not exist here.

Unlike the litigants in *Bradley* and *Huddleston*, petitioner had ample opportunity to make its argument in the court of appeals in a timely manner. The President's pocket veto of H.R. 4353 took place within ten days of the filing of the district court's order. Under *Bradley* and *Huddleston*, petitioner would have been entitled to raise the validity of the pocket veto in its appeal to the court of appeals or perhaps in a pre-appeal motion in the district court. Petitioner did not do so, although it appears to have been aware of the relevant events surrounding the passage of H.R. 4353. See page 7 note 4, *supra*. Moreover, it was clear in *Bradley* and *Huddleston* that there had been a change in the law. Here, there was no official publication of a new statute,

so that the court below could not rely on a generally accepted source to confirm the alleged change. In addition, the government takes the position that the President's pocket veto was effective and that the alleged change in the law never occurred. Thus, unlike the parties in *Bradley* and *Huddleston*, petitioner was asking the court below not only to apply a change in the law, but to make a preliminary determination that such a change had taken place. Accordingly, *Bradley* and *Huddleston* do not support petitioner's contention that the court of appeals abused its discretion in declining to allow petitioner belatedly to mount a fresh challenge to the district court's decision.[6]

---

[6]Petitioner also cites *Fusari* v. *Steinberg*, 419 U.S. 379, 387 & n.12 (1975), in which this Court remanded for consideration of amendments to the Connecticut statute governing the procedures under consideration and criticized counsel for failing to inform the Court about the existence and significance of the amendments. *Fusari* is distinguishable from petitioner's case. In *Fusari*, unlike this case, there was no question that the Connecticut statute had been amended; moreover, the amendments had become effective while the case was pending before the Supreme Court and came to the Court's attention before its decision issued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT E. KOPP
Attorney

MAY 1983

DOJ-1983-05

No. 82-1446

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LIFETIME COMMUNITIES, INC.,
Petitioner,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

Of Counsel:

THEODORE L. FREEDMAN
LEVY AND ERENS

RANDOLPH W. THROWER
FRANCIS M. GREGORY, JR.
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Suite 800
Washington, D.C. 20006

PETER L. ZIMROTH
KOSTELANETZ AND RITHOLZ
80 Pine Street
New York, New York 10005

KENNETH H. SINGER
Vice President-General Counsel
Lifetime Communities, Inc.
3740 Beach Boulevard, Suite 202
Jacksonville, Florida 32207

RICHARD F. LEVY
Counsel of Record
LEVY AND ERENS
208 South LaSalle Street
Suite 1100
Chicago, Illinois 60604
(312) 368-9500
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Legislative Material:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1446

LIFETIME COMMUNITIES, INC.,
Petitioner,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

I.

The Administrative Office misstates the question presented by this case in a patent attempt to avoid the impact of the controlling decisions of this Court. Respondent asserts that the question is whether the Second Circuit "abused its discretion in refusing to consider *an argument* raised by petitioner for the first time . . ." while its Petition for Rehearing was pending. Brief for the Respondent in Opposition at I (emphasis added). The actual question presented is whether the Court of Appeals had the discretion to fail to determine whether a bill passed by the United States Congress, and undisputedly dispositive of this case, became the law of the United States subsequent to the District Court order appealed from.

Respondent would have the Court believe that the issue is whether petitioner waived its right to challenge error in the Judgment of the District Court by failing to make an argument at an earlier time.[1] While that is the nature of the issue presented by *every* case cited by respondent in support of its position,[2] *not one of these cases stands for the proposition that a Court of Appeals has discretion to refuse to apply a statute of the United States which became law subsequent to the District Court order from which it was appealed.* Furthermore, since anytime it is asserted that a statute governs the result in a case, the court must determine (1) that the statute exists, and (2) that the statute applies, respondent's authorities do not support the proposition that an appellate court has discretion to refuse to determine whether recently enacted legislation in fact became law.[3]

II.

Respondent does not dispute the fact that H.R. 4353, 97th Cong., 1st Sess. (1981), if law, governs the outcome of this case. Nor does respondent dispute the principle that an appellate court must apply the law currently in effect whenever a case is *sub judice*.

---

[1] Lifetime, of course, does not and could not contend that the District Court erred in failing to apply H.R. 4353, because if the bill became law, as Lifetime asserts, it became law *after* the District Court entered its order.

[2] Brief for the Respondent in Opposition at 6-8. In each case cited, the argument that error had been committed below was either (1) not raised in the District Court, (2) raised below but not pressed on appeal, (3) raised on appeal but found to have been abandoned, (4) raised on appeal by another party but not adopted or answered by the party in question, or (5) raised in an improperly filed appeal.

[3] Respondent's appeal to principles of finality is likewise irrelevant. As respondent acknowledges, no final order determining the amount of Lifetime's payment to the Fund has yet been entered. Brief for the Respondent in Opposition at 2 n.1. Respondent cannot be said to have relied on any final action of the courts below.

Instead, respondent contends that the appellate court had discretion to refuse to determine whether recently enacted legislation became a statute of the United States, and if so, to refuse to apply this statute, because Lifetime did not raise the question of the effectiveness of the veto of H.R. 4353 at an earlier time. Yet respondent never suggested any untimeliness in the Court of Appeals, and indeed, agreed that the issue should be heard. Moreover, prior to Lifetime's raising the issue, counsel for respondent were obviously unaware of the potential invalidity of the purported veto of H.R. 4353 (an issue which the government asserts "presents difficult questions of constitutional law," Brief for the Respondent in Opposition at 9), since, had they been aware of it, counsel undoubtedly would have complied with their "continuing duty to inform the Court of any development which may conceivably affect an outcome." *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). *See Douglas v. Donovan*, No. 82-1248 (D.C. Cir. April 12, 1983): "As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. . . . This is especially true for government attorneys, who have special responsibilities to both this court and the public at large." [4]

---

[4] The most recent judicial challenge to the constitutional validity of a pocket veto used during an intersessional recess of Congress (the same circumstances under which H.R. 4353 was purportedly vetoed) was concluded when the government consented to entry of judgment for the plaintiff. *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). At the time, the Attorney General of the United States issued the following statement:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has

In any event, there is no basis for a discretionary exception to the rule that a reviewing court must apply a recently enacted statute. To the contrary, this Court has recognized that the obligation of a reviewing court to decide a case under a new statute applies regardless of whether counsel for the parties bring the new law to the court's attention *at all*.[5]

Fusari v. Steinberg, *supra*, involved a constitutional challenge to a Connecticut statute. Subsequent to this Court's notation of probable jurisdiction, but prior to briefing on the merits and oral argument, the Connecticut legislature enacted major revisions of the law in question. 419 U.S. at 385, 387 n.12. Counsel for neither party informed the Court of the substantial changes brought about by the new law.[6] 419 U.S. at 387 n.12. Nonetheless, this Court held that it "must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered." 419 U.S. at 387. The case was remanded for reconsideration in light of the new law. 419 U.S. at 387-

---

specifically authorized an officer or other agent to receive return vetoes during such periods.

Reprinted in 123 Cong. Rec. S39334 (December 15, 1977). Thus, had the Justice Department realized that H.R. 4353 had been subject to a purported pocket veto during an intersessional recess of Congress during which an agent of the House was authorized to receive the bill, the Department's attorneys would have recognized that the attempted veto was a "significant event that may bear directly on the outcome of litigation."

[5] In the instant case, of course, petitioner brought the statute to the attention of the Court of Appeals as soon as counsel for petitioner became aware that the veto was potentially defective, and while the case was still before that court on a petition for rehearing. Any suggestion to the contrary is unfounded, illogical, and offensive.

[6] "The only reference to changes in the law [in one party's brief] actually gives the impression that their effect is negligible." *Fusari v. Steinberg*, *supra*, 419 U.S. at 391 (Burger, C.J., concurring).

90. Nowhere did the Court even hint that it had discretion to refuse to decide the case under the new statute because of counsel's failure to inform the Court of the significant statutory changes.[7]

Nor did the government suggest to the Second Circuit that it had any discretion to refuse to consider the applicability of H.R. 4353. When Lifetime raised the issue in the Court of Appeals, respondent stated:

> In the interests of justice, the government believes that this case should be reheard by the panel on this issue alone, and accordingly a briefing schedule should be established so that Appellant's claim may be fully aired.

This is precisely what was required by the decisions of this Court.

---

[7] Furthermore, respondent has no basis for suggesting that the Court of Appeals denied petitioner's H.R. 4353 Motion on the grounds of the asserted discretion. The Court of Appeals gave no reasons for its decision, and respondent never raised any claim of lack of timeliness below. Indeed, respondent did not challenge the applicability of *Fusari* when Lifetime cited it in its motion for leave to file a memorandum supplementing its petition for rehearing. Respondent's attempt to characterize the decision below as it does is unfounded speculation.

CONCLUSION

The petition for writ of certiorari should be granted. Petitioner respectfully suggests that the Judgment below be summarily vacated with instructions to the Court of Appeals either (i) to determine whether the veto of H.R. 4353 was effective, or (ii) to remand the case to the District Court to make such a determination. *Fusari v. Steinberg*, *supra*; *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974); *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940).

Respectfully submitted,

/s/ Richard F. Levy

RICHARD F. LEVY
Counsel of Record
LEVY AND ERENS
208 South LaSalle Street
Suite 1100
Chicago, Illinois 60604
(312) 368-9500
Attorney for Petitioner

Of Counsel:
THEODORE L. FREEDMAN
LEVY AND ERENS

RANDOLPH W. THROWER
FRANCIS M. GREGORY, JR.
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Suite 800
Washington, D.C. 20006

PETER L. ZIMROTH
KOSTELANETZ AND RITHOLZ
80 Pine Street
New York, New York 10005

KENNETH H. SINGER
Vice President-General Counsel
Lifetime Communities, Inc.
3740 Beach Boulevard, Suite 202
Jacksonville, Florida 32207

May 23, 1983